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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 240

BRIMSTONE RAILROAD & CANAL COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, LOUISIANA WESTERN Railroad Company, Kansas City Southern Railway Company and Interstate Commerce Commission

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINIONS

The specially constituted District Court (Circuit Judge Walker and District Judges Dawkins and Burns) filed two opinions. In issuing the preliminary injunction after the first hearing Judges Dawkins and Burns concurred and Judge Walker dissented (R. I, 130) 13 F. (2d) 914. In vacating the preliminary injunction and dismissing the

amended bill of complaint on the final hearing Judges Walker and Burns concurred and Judge Dawkins dissented (R. I, 322) 17 F. (2d) 165.

The reports of the Commission appear as *Divisions Received by Brimstone Railroad & Canal Company*, 68 I. C. C. 375; 88 I. C. C. 62; 104 I. C. C. 415.

JURISDICTION

The suit was commenced under Urgent Deficiencies Act (c. 32, 38 Stat. 219, 220; U. S. C., Title 28, Sec. 47). The final decree was entered and the appeal was allowed on the same day, January 19, 1927. (R. I, 325, 330.)

QUESTIONS

In ordering divisions of interstate joint rates to Brimstone Railroad & Canal Company, 9.07 miles in length, on freight interchanged with its connections not to exceed,

August 1, 1921, to July 1, 1922:

From the Louisiana Western Railroad Company:

On all carload traffic, $7.22 per car; on merchandise, less than carloads, 11.5 cents per 100 pounds.

From the Kansas City Southern Railway Company:

On all carload traffic, $8.89 per car; on merchandise, less than carloads, 15.5 cents per 100 pounds.

July 1, 1922, on and after:

From the Louisiana Western Railroad Company:

On all carload traffic, $6.50 per car; on merchandise, less than carloads, 10.5 cents per 100 pounds.

From the Kansas City Southern Railway Company:

On all carload traffic, $8 per car; on merchandise, less than carloads, 14 cents per 100 pounds (R. I. 127, 128),

I. Did the Commission fail to conform to the provisions of the statute in conducting its hearings?

II. Had the Commission the power and authority under the statute to enter the order of December 14, 1925, which fixed the divisions as from August 1, 1921 (R. I, 127, 128), the date of the order which directed the investigation? (R. I, 3.)

III. Is the evidence adequate to sustain the order?

IV. Are the divisions fixed by the order so unreasonably low as to be non-compensatory and therefore a deprivation of the property of appellant without due process of law?

STATUTES

Section 4 of the Act of June 29, 1906, commonly known as the Hepburn Act, which amended Section 15 of the Act to Regulate Commerce, provides (c. 3591, 34 Stat. 584, 589, 590):

> * * * Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among

themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

Section 12 of the Commerce Court Act, approved June 18, 1910, which amended Section 15 of the Act to Regulate Commerce, provides (c. 309, 36 Stat. 539, 551, 552):

> * * * Whenever the carrier or carriers, in obedience to such order of the commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each

carrier party thereto, which order shall take effect as a part of the original order.

* * * * *

The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line.

The Transportation Act provides (c. 91, 41 Stat. 456, 474, 475; U. S. C., Title 49, Sec. 1):

SEC. 400. The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

* * * * *

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make

reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

The Transportation Act further provides (c. 91, 41 Stat. 456, 484, 485, 486; U. S. C., Title 49, Sec. 15):

SEC. 418. The first four paragraphs of section 15 of the Interstate Commerce Act are hereby amended to read as follows:

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or un-

reasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property,

Union Sulphur Company produces sulphur at Sulphur Mine, a point on appellant's line. (63 I. C. C. 74.) For the year ended December 31, 1920, the outbound tonnage consisted of 17,314 cars of sulphur, of which 4,045 cars moved all rail; 21 cars of forest products, 14 cars of rice, 2 cars of crude petroleum, 25 cars of iron and steel articles, 4 cars of household goods, and 2 cars of miscellaneous commodities. For that year the inbound tonnage consisted of 1,065 cars of crude petroleum and 131 cars of grain, hay, coal, forest products, iron and steel articles, household goods, and other commodities. The crude petroleum was used by Union Sulphur. Appellant originated 36 tons and received 323 tons of less-than-carload freight.

Slightly over 98 per cent of the carload tonnage outbound and inbound and 73 per cent of the less-than-coarload tonnage was for Union Sulphur. (68 I. C. C. 381; R. I, 47.) Appellant does not engage in the carriage of passengers, mail, or express. (68 I. C. C. 382; R. I, 48, 49.) Other than the secretary, the officials of the two companies are the same and appellant pays certain proportions of their salaries. (68 I. C. C. 379; R. I, 45.) The vice president and secretary serve without compensation. (104 I. C. C. 422; R. I, 110.)

Appellant has no funded debt. Its demand notes used in financing the construction work have been liquidated and in 1914 a dividend of 100 per cent was declared. Dividends of 60 per cent in 1917 and 40 per cent in 1918 were declared and a

credit balance in profit and loss of $165,378.82 was shown in appellant's annual report of December 31, 1920. (68 I. C. C. 382; R. I, 49.) The accumulated surplus is (April 4, 1922) sufficient to declare a dividend of about 100 per cent on the capital stock. (68 I. C. C. 387; R. I, 55.) With the exception of five shares, the entire capital stock of $200,000 (2,000 shares of $100 each) is all owned by Union Sulphur (68 I. C. C. 382; R. I, 49), which thus controls the appellant. The two concerns represent one enterprise and a single investment. (68 I. C. C. 386; R. I, 53, 54.)

Appellant owns 3 standard locomotives and 156 gondola coal cars of 100,000-pound capacity (68 I. C. C. 379; R. I, 45), but has no repair shop, roundhouse, water wells, water tanks, pumps, or water service equipment (68 I. C. C. 378; R. I, 44). Water is obtained from Union Sulphur without charge and the train shed of Union Sulphur is used as the roundhouse of appellant. (68 I. C. C. 378; R. I, 44.) Union Sulphur owns 7 standard locomotives, 15 flat cars, 10 box cars, and 75 dump cars. (68 I. C. C. 379; R. I, 45.) Repairs to equipment which involved an expenditure of nearly $73,000 in 1920 were made by Union Sulphur at cost plus 30 per cent, and one of the track crews of Union Sulphur maintains the roadway and track at actual cost to appellant, or about $29,000 in 1920. (68 I. C. C. 378; R. I, 44.) Without charge appellant operates over 6.9 miles of Union Sulphur's tracks. (68 I. C. C. 378; R. I, 44.) Part of a warehouse

of Union Sulphur is used without charge as the freight station of appellant for the receipt and delivery of less-than-carload freight for the public; the tracks of Union Sulphur adjacent thereto are used as public team tracks of appellant and an employe of Union Sulphur acts as agent of appellant. Appellant uses a part of the office of Union Sulphur at $5 per month rental, including light, heat, and janitor service; the clerical assistants employed there and paid by Union Sulphur are also used by appellant. The yardmaster at Sulphur Mine acts for both but is paid by Union Sulphur. (68 I. C. C. 378, 379; R. I, 44, 45.)

Appellant purchases its fuel oil from Union Sulphur, and supplies, other than steel rails, crossties and materials used in extension work, are obtained at cost from Union Sulphur. The latter can purchase many of them cheaper in large quantities. Appellant has its own engine crews and other employes. (68 I. C. C. 379; R. I. 45.)

Union Sulphur performs its intraplant switching and, sometimes, when convenient, the power of Union Sulphur is used to move traffic between the plant and the interchange tracks of connecting carriers. The handling of the traffic of Union Sulphur by appellant is not incident to any manufacturing process and the movements to the junction points are made to accommodate the schedules of the trunk-line connections. (68 I. C. C. 381; R. I, 47.)

Empty cars for sulphur loading are moved by appellant from the junctions to the sulphur storage bins about half a mile from the point of connection, whence they are moved by the power of Union Sulphur to the sulphur vats for loading after being weighed light on Union Sulphur's scales near the box-car loading plant. After loading the cars are again weighed by Union Sulphur. The cars are then moved by appellant about 0.5 mile over the line of Union Sulphur to the point of connection with appellant, thence to the track scales of appellant, about 0.5 mile, for weighing, thence back 0.75 mile over the line of appellant to the junction, and 0.5 mile over the interchange track of Southern Pacific at Brimstone Junction. The movement in the reverse direction is the same. (68 I. C. C. 379, 380; R. I. 46.) (See map, R. I. following page 342.)

For the first six months of 1921 appellant forwarded via Southern Pacific 419 cars of sulphur all rail and 2,621 cars which moved to Sabine by water; and during that period received 3,352 cars of fuel oil via that line. Over Kansas City Southern 358 cars of sulphur were forwarded. During the same period 7,408,767 pounds of various commodities were moved by appellant for shippers other than Union Sulphur. For the carriage of 958,438.74 tons, or 18,436 cars, of all commodities, all but 6,695 tons of which, or 186 cars, was interstate, between the plants of Union Sulphur and the

junctions with the trunk lines, the appellant received $243,163.63, or an average of $13.19 per car. (68 I. C. C. 381; R. I, 48.)

Appellant has been a participant in joint rates for a number of years and concurs in and is a party to various tariffs of Southern Pacific and Kansas City Southern and to various agency tariffs. During the period of Federal control the divisions of appellant with Kansas City Southern and Southern Pacific and their connections were revised by a committee of traffic officers of the United States Railroad Administration as a part of the general revision during Federal control of the divisions of trunk lines and short lines. (68 I. C. C. 383; R. I. 50.)

It was found by the Commission and is not disputed that the present divisions include the increases of 35 per cent under the general increases of 1920, *Ex parte 74*, 58 I. C. C. 220, and the decreases of 10 per cent under the general decreases of 1922, *Reduced Rates, 1922*, 68 I. C. C. 676 (68 I. C. C. 384, R. I. 51; 104 I. C. C. 416, R. I. 101; *Lallande*, R. I. 171; 104 I. C. C. 433, 434, R. I. 124; App. Br. 33). The present divisions are as follows:

Per 100 pounds—Sulphur, when destined to Port Arthur, Sabine, or Galveston, Tex., New Orleans, Gretna, or Algiers, La., for coastwise movement or for export, 24.3 cents per gross ton, or 1.085 cents; sulphur, when destined to points other than those shown above, 2.7 cents; fuel oil,

1.2 cents; brick, coal, and stone, 2.4 cents; cement, 3 cents; all other carload traffic, 3.6 cents; merchandise, less than carloads, 12 cents. (88 I. C. C. 74, 75; R. I, 73.)

The difference in the divisions on sulphur for coastwise movement and for export, on the one hand, and those on all other sulphur, on the other, is explained by the difference in the rates and the handling and movement of the traffic. (68 I. C. C. 385; R. I, 52.) On all rail movements of sulphur appellant is shown to receive 3 cents per 100 pounds, or about $24 per car, for the transportation to the interchanges, *e. g.*, Kansas City Southern about 7.5 miles, and Southern Pacific about 1.5 miles exclusive of the haul to and from the scales. (68 I. C. C. 387; R. I, 55.) The capacity of appellant's cars is 100,000 pounds and divisions would be $30 at the 3-cent division and $12 at the 1.2 cent division. (68 I. C. C. 387; R. I, 55.)

Without entering any formal order, the Commission condemned the divisions as disproportionate to the service rendered, as tantamount to a rebate to Union Sulphur, as unjust, unreasonable, and inequitable (68 I. C. C. 387; R. I, 56), and directed that the record should be held open for a period of 90 days in order that appellant might make necessary cost studies for the purpose of arriving at reasonable divisions based on the cost of the service rendered; and further directed that the out-of-line movement to the track scale on traffic interchanged

with Southern Pacific should not be included in computing such cost (68 I. C. C. 388; R. I, 56).

The one enterprise and single investment feature so fully elaborated by the Commission in its first report (68 I. C. C. 386; R. I, 53, 54) was not abandoned or even minimized in either of the two subsequent reports. In its second report the Commission draws from the first and repeatedly refers to the relations of appellant and Union Sulphur. (88 I. C. C. 62, 68, 69, 71, 73; R. I, 65, 66, 67, 69, 70.) The same is true of the third report which refers to "the history of Union Sulphur," "the facts concerning the incorporation" of appellant, and "the substantial dividends declared by the latter." (104 I. C. C. 416; R. I, 102.) Other references to the same or similar subjects occur. (104 I. C. C. 422, 423, 428, 432, 433; R. I, 108, 109, 110, 117, 121, 123.)

The second report relates primarily to the cost study and the controversy between the Southern Pacific and Kansas City Southern as to divisions. A table listing 13 industrial short lines showing divisions for "distances somewhat similar" to those in the instant case are set out and result in charges ranging from about $3 to $11.50 per car. (88 I. C. C. 74; R. I, 72.)

Subsequently to the promulgation of the second report, upon consideration of the record and of appellant's petition for rehearing the proceeding was reopened that the Commission might conduct a cost study. Its conclusions, in which are included the basis on which it made the order retroactive

and certain further findings on the Southern Pacific and Kansas City Southern controversies as to divisions, cover many pages of the record. Following that report the order was entered. The suit was then filed.

The case came on for hearing before the specially constituted District Court on the pleadings and a transcript of the Commission record. In issuing the preliminary injunction the District Court (District Judges Dawkins and Burns concurring) said that " without going into other matters * * * the order is given a retroactive effect of more than four years under conditions which we do not believe, in view of provisions of the statute defining the Commission's powers, is permissible. * * * There has never been, so far as the record in this case discloses, any joint rate 'established' by the Commission. As above pointed out all that was done in *Ex parte 74* was to authorize the railroad companies of the country to increase their rates within the maximums fixed for each group." (13 F. (2d) 914, 916, 919; R. I, 134, 140.)

In vacating the order granting the preliminary injunction and in dismissing the bill on the final hearing the District Court (Judges Walker and Burns concurring) said that "the rates in question came into existence as results of increasing previously existing rates as authorized by the order made in *Increased Rates, 1920*, 58 I. C. C. 220, and of reducing previously existing rates as authorized by the order made in *Reduced Rates, 1922*, 68

I. C. C. 676. * * * In establishing the new joint rates, the acts of the carriers were pursuant to a finding or order of the Commission. * * * We are of the opinion that within the meaning of the above-quoted provision (Section 15 (6)) the joint rates in question were established pursuant to findings or orders of the Commission." (17 F. (2d) 165, 166; R. I, 323.)

The final decree dismissing the bill of complaint was then entered. (R. I, 325.) Pending the disposition of the appeal the District Court stayed the force and effect of the order of the Commission. (R. I, 331.)

SUMMARY OF ARGUMENT

That the operations of Union Sulphur and appellant represent one enterprise and a single investment was a circumstance which the Commission not only had the power but was in duty bound to consider.

That a division of $10 to $24 per car appears excessive and disproportionate for the service, which is in some respects similar to a switching service, and as tantamount to a rebate to Union Sulphur, and that high dividends have been declared in the past and the accumulated surplus is sufficient to declare a dividend of almost 100 per cent on the capital stock, are also circumstances which the Commission found as indicating the divisions to appellant are unreasonable.

The huge record which was built up by the three hearings consists largely of testimony and exhibits

supplied by the appellant and indicates that the Commission had not only not acted arbitrarily but had given the case all of the consideration it was entitled to receive. The thorough analysis of the tedious evidence and numerous and voluminous exhibits and the findings and conclusion thereon need no further elaboration.

If the divisions prescribed for the appellant are just, reasonable, and equitable it does not lie within the power of appellant to complain that the Commission did not do the impossible and conduct similar hearings with respect to Southern Pacific and Kansas City Southern. Neither the statute nor the decisions require on the part of the Commission a course of action which would render impossible the enforcement of the statute. The case falls clearly within and is controlled by the *New England Divisions Case*.

As the divisions were made out of through joint rates authorized by *Ex parte 74* and *Reduced Rates, 1922*, the Commission clearly had the authority to make the order effective as of the date of the order for investigation, August 1, 1921. Without so entering it the order would avail nothing to correct the unreasonable and excessive divisions which have been received by appellant since that time.

The failure of Southern Pacific and Kansas City Southern to participate in the hearing in the District Court and in the hearing of this appeal would indicate they are satisfied with the divisions as fixed by the Commission; and as the appellant has

been accorded the hearing provided by the statute, it does not lie within its power to complain. Due to the one enterprise and single investment situation, it seems immaterial what becomes of that part of the joint through rate which goes to appellant's connections.

ARGUMENT

I

THE COMMISSION NOT ONLY HAD THE POWER AND AUTHORITY BUT IT WAS ITS DUTY TO INVESTIGATE AND CONSIDER THE ONE ENTERPRISE AND SINGLE INVESTMENT WHICH IS THE DOMINANT FEATURE OF THIS CASE

There is an ancient maxim that "He who comes into a court of equity must come with clean hands." If the prayer of the bill of complaint shall prevail, the inevitable result will be that the appellant shall have received divisions "so disproportionate as to amount to rebates or discriminations in favor of the proprietary company in view of the service rendered." (68 I. C. C. 386; R. I, 54.) Citing *The Tap Line Cases*, 234 U. S. 1, the Commission has found that since the appellant "is so closely allied to the proprietary company, the extent to which it receives divisions from the trunk lines merits careful consideration" and "One purpose of the act is to prevent rebates effected by means of exorbitant divisions which find their way to proprietary companies through common carriers like the Brimstone. We can not overlook the fact that high divi-

dends have been declared in the past or that the accumulated surplus is now sufficient to declare a dividend of almost 100 per cent on the capital stock." (68 I. C. C. 387; R. I, 54, 55.)

This case presents nothing new or unusual. It falls clearly within a line of cases in which the one enterprise and single investment arrangement has been condemned repeatedly. The cases are all one way.

In *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 519, this Court stated, citing numerous cases, "We have often declared that the purpose of Congress in the Elkins law was to cut up by the roots every form of discrimination, favoritism, and inequality. * * * It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described, when they clearly effect discrimination and inequality."

The Tap Line Cases, 234 U. S. 1, 28, 29:

> It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to par-

> ticipate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does.

O'Keefe, Receiver, v. *United States*, 240 U. S. 294, 304:

> * * * The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by act of Congress from considerations affecting the public welfare. * * * The real basis of appellant's complaint, representing a trunk-line carrier, is that the allowance to the tap line is too small. It is

questionable whether it lies in the mouth of the line carrier to object on this ground.

Manufacturers Railway v. *United States*, 246 U. S. 457, 467, 479, 480, 481:

In conclusion the Commission announced: "We regard the present allowances which, as stated, average slightly above $4.50 per car, as effecting unlawful results."

* * * * *

The question of the reasonableness of the allowances or divisions made and to be made to the Railway came into the case incidentally, but inevitably, because of the heavy shipments to and from the Brewery and the community of interest between it and the Railway. Upon this point there was abundant evidence to support the conclusion of the Commission that in making up the joint rates not more than $2.50 per car should be added to the trunk-line rates to St. Louis, and the intimation (not final, and not carried into the order) that any division to the Railway out of the joint rate in excess of $2.50 per car would amount to an undue preference or indirect rebate to the Brewery. Beyond this, no question of separate rates was involved, and the Commission did not err, in view of the issues, in assuming the trunk line rates to be reasonable *per se*. Although it might have dealt with the divisions in the same order, so far as necessary to prevent undue favoring of the Brewery (*O'Keefe* v. *United States*, 240 U. S. 294, 300–302), it was within the discretion of the Commission to

allow the carriers to make their own agreement upon the subject, as contemplated by the first paragraph of § 15 of the act (36 Stat. 551), subject to its review.

* * * * *

Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of §§ 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589–591, c. 3591; 36 Stat. 551–554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 469–470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91.

For other cases to the same effect see:

Industrial Railways Case (Short Line Railroads), 29 I. C. C. 213;

Industrial Railways Case (Short Line Railroads), 32 I. C. C. 129;

Second Industrial Railways Case (Short Line Railroads), 34 I. C. C. 596;

Chicago, West Pullman & Southern Railroad (Second Industrial Railways Case), 37 I. C. C. 408;

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Chestnut Ridge Railway, 41 I. C. C. 62;

Chestnut Ridge Railway v. *United States*, 248 Fed. Rep. 791;

Louisiana & Pine Bluff Divisions, 40 I. C. C. 470;

Louisiana & Pine Bluff Railway v. *United States*, 257 U. S. 114;

Northampton & Bath Railroad (Second Industrial Railways Case), 41 I. C. C. 68;

Owasco River Railway (Second Industrial Railways Case), 53 I. C. C. 104;

Lake Erie & Fort Wayne Railroad (Second Industrial Railways Case), 58 I. C. C. 558;

Birmingham Southern Railroad v. *Director General*, 61 I. C. C. 551.

II

THE EVIDENCE WAS ADEQUATE UPON WHICH TO REST THE ORDER

The order of investigation was entered on August 1, 1921, and the order assailed was entered on December 14, 1925, or more than four years later. After the first divisions order was entered on March 10, 1924, the appellant filed the petition for

further hearing (104 I. C. C. 416; R. 1, 102), which the Commission allowed. The further hearing, therefore, was on appellant's own application. Appellant now complains there is no evidence of any operating expenses for the years 1924 and 1925, and the Commission, therefore, had nothing before it upon which to fix the divisions for those years.

Obviously, if the Commission must keep the case open in order that new testimony may be taken each year and from year to year on operating expenses or other subjects, it would be impossible to fix the divisions. The statute does not require that hearings shall be perennial. Appellant is not in a position to complain that the Commission prolonged the entry of its final order when the appellant asked for the rehearing. The voluminous record of 774 printed pages of oral testimony and exhibits in narrative form (with the exception of certain exhibits in full) would indicate the completeness of the investigation and hearing. Moreover, the evidence which the Commission carefully examined covered a wide range of subjects. There is no presumption that the Commission was considering matters *aliunde*. The facts found in the first report may not seriously be brought in dispute.

Coming to the second report the Commission explains fully the methods used in the cost study (88 I. C. C. 63; R. 1, 58) as applied to the operations of appellant and Union Sulphur. In explanation of method of cost study, a witness for the appellant stated that the factors necessary to determine the

cost "were not available and it was necessary to make a record of such factors currently for a test period" and "such record was made over a period of seven days," and "consisted of, first, a record of the average time it took to handle a car from each connection to its destination and return, and, second, the cost of that service." Appellant's witness further explained that the accounts as kept by the appellant "were found on examination not to include all items of expenses properly chargeable to that company, which expenses have heretofore been assumed by Union Sulphur Company due to the lack of proper accounting and the closely allied situation existing between" appellant and Union Sulphur. (R. I, 337.) The appellant's line was divided into zones (R. I, 194) and "a man was placed on each Brimstone engine * * * to keep a record of the exact number of minutes each engine worked in each zone each day, which determined the total number of minutes the engine worked in each zone during the seven days' test period. That a man was also on the Union Sulphur Company's engine to keep a record of the time spent by it in performing service which that Company was entitled to require of the Brimstone as common carrier service, which, when performed in the common zone, was added to the time spent by the Brimstone engine in each zone."[1] (R. I, 196.)

[1] In *Manufacturers Railway* v. *United States*, 246 U. S. 457, 491, Mr. George F. Moore, President of Manufacturers Railway, in speaking of the cost of making the various move-

After reviewing the evidence or cost study submitted by the appellant, the Commission disallowed the allocation of 90 per cent of the computed maintenance, taxes, and interest rental on these tracks to the appellant on the basis of alleged use as not warranted (88 I. C. C. 69; R. I, 66) because the service of Union Sulphur's locomotives could be largely eliminated and "the principal use of this trackage is by the locomotive of the proprietary company in performing service which clearly is intraplant switching." On the record the Commission found "that even an equal division of the maintenance, taxes, and interest rental between the two companies would be more than should be as-

ments within the plant, testified: "I have tried in every way I could think of to determine whether the average cost of moving a car to have it weighed exceeds the average cost of moving a car for interchange with connections, or moving a car between one industry in the plant and another. The best way, to my notion, was to ride upon the engine doing the switching, for a certain length of time, and notice the business that that switch crew was handling during the time that I myself was with the engine. That I have done, and I would find the same crew and engine handling all different classes of the named groups in one cut at times, and then at times I would find an engine moving with only one class of business as grouped, and I could not determine any difference in the cost of handling the placement of one class of business as compared with the placement of another class of business. This was brought out very clearly. * * * So it has been impossible for me to segregate the cost of each of these particular services. I have stated that there is a difference of cost sometimes between handling two cars in a like business." (No. 24, Record, pp. 279, 281, Supreme Court, October Term, 1917.)

signed to the Brimstone." (88 I. C. C. 69; R. I, 66.)

The Commission questioned appellant's original estimates for cost of reproduction new as clearly excessive because they are based in large part on the peak prices of 1920. (88 I. C. C. 70; R. I, 66; R. II, 615, 616, 617, 618.) Appellant charged depreciation on freight cars at the rate of 10 per cent per annum which presupposes a service life of only 10 years with no allowance for salvage. Pointing out the inconsistency in the claim of appellant that its property "is kept up to a state of highest efficiency by constant maintenance and repairs" (88 I. C. C. 70; R. I, 67), the Commission also found that appellant has failed to include $16,987.28 earned as an allowance of 1.5 cents per mile from other carriers for the use of its cars and was charged $7,475.48 covering per diem for the use of foreign freight cars (88 I. C. C. 70; R. I, 67).

The Commission also questioned various traffic, transportation, and general expenses as not bona fide expenses of appellant, as the Commission could not understand why, as little more than a switching road, appellant should maintain a general office and officials in New York City. It appears that Union Sulphur maintains the office and appellant shares in the expense. As the Union Sulphur business constitutes practically the whole of the appellant's traffic, the Commission found appellant had little occasion to solicit traffic. (88 I. C. C. 71; R. I. 68.)

Because of the greater haul and a lesser volume of traffic the Commission found the cost of delivery to the Kansas City Southern interchange, 6 miles, in excess of the cost of delivery to Southern Pacific interchange, 1 mile, which must necessarily bring about some difference in the divisions. (88 I. C. C. 73; R. I, 71.)

The Commission set up a table of 13 cases showing the lower charges per car which the Commission had found reasonable during Federal control for distances somewhat similar to those in the instant case. Subject to the increases of 1920 and decreases of 1922, the table shows charges ranging from $3 to $11.50 per car. The Commission also found that the services here involved are performed under favorable circumstances and more favorable than in many of the cases cited in the table. (88 I. C. C. 74; R. I, 72, 73.)

Following the hearing on appellant's petition for rehearing, the Commission filed a third elaborate report (104 I. C. C. 415; R. I, 100) in which it separately and fully analyzed and considered all of the evidence and argument of appellant on the various items on which it asserted claims, viz: 1, Rail replacements. 2, Maintenance of leased tracks. 3, Locomotive repairs, depreciation, and retirements. 4, Car repairs. 5, Car depreciation and retirements. 6, Traffic and general expenses. 7, Adjustment of operating expenses. 8, Taxes. 9, Joint facility and equipment rents. 10, Material supplies and cash. 11, Apportionment of expenses

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The facts found by the Commission and its reasoning and conclusions thereon speak for themselves and no good purpose would be subserved by further comment thereon.

The two opinions of the divided District Court never reached beyond the single question of the power of the Commission on the facts of this case to make its order retroactive as of August 1, 1921. The order was first suspended and then sustained on that question alone and the appellant argues here that the Commission is wholly without such power.

III

THE COMMISSION HAD THE AUTHORITY UNDER THE STATUTE TO MAKE ITS ORDER EFFECTIVE AS OF AUGUST 1, 1921, THE DATE OF THE ORDER OF INVESTIGATION, AND THE DISTRICT COURT WAS RIGHT IN SO HOLDING

Counsel complain that the Commission treated the case as a *divisions* case and then limited its investigation to the appellant, its operations and financial status alone without making a similar investigation of the Southern Pacific and Kansas City

Southern, their operations and financial status; and, therefore, they say, the Commission wholly failed to comply with Section 15 (6) which provides the Commission, in so prescribing and determining the divisions of joint rates, fares, and charges, "shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return upon their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Certainly learned counsel do not maintain in each instance that the Commission prescribes divisions among carriers that it must first hold a hearing for each carrier separately on all of these subjects in detail. A small amount of traffic in a single article may move from Boston to San Francisco. According to argument of counsel for appellant, the Commission, before it may fix the divisions, must call before it all of the carriers and receive evidence for and against each and all of the subjects listed in the statute.

In reducing divisions of joint through rates in order to eliminate rebates, preferences, and discriminations brought about through the device of one enterprise and a single investment, it must be conceded that, in passing on the validity of the order of the Commission, that circumstance is also to be considered.

The record shows that, among other things, the Commission had before it 390 sheets consisting of divisions sheets, supplements, and amendments thereto issued between May 1, 1906, and May 1, 1921, on all classes and commodities moving interstate or intrastate or for export from and to points on appellant's line and routed via Kansas City Southern and Southern Pacific. (R. II, 718, 754.)

The Commission has prescribed, after full hearings, the full amount which it considers the appellant is entitled to receive as a division of the through joint rate. Southern Pacific and Kansas City Southern were vigorous contestants, certainly against each other if not against the appellant, before the Commission. Appellant does not claim that the Commission failed to *accord to it* the hearing provided by the statute. Its claim is for higher divisions. In filing the bill of complaint appellant named both Louisiana Western and Kansas City Southern as defendants. Louisiana Western filed an answer in which it stated it would leave the matter for the decision of the courts. (R. II, 699.) Kansas City Southern filed no answer and neither

defendant has ever appeared in the case. If appellant by the order of the Commission has received all it is entitled to under the law, the adequacy or inadequacy of the amounts left for Louisiana Western and Kansas City Southern would seem to be a matter with which appellant has no concern. Those companies may take care of themselves.

The case falls squarely within the *New England Divisions Case*, 261 U. S. 184. In that case the Hudson River was made the dividing line and the divisions of the New England lines to the east thereof were increased 15 per cent. The arguments which were advanced in that case on the question of invalidity of the order have been followed in the brief for the appellant in the instant case, *e. g.*, the Commission had no authority to make such a division but that it should have considered the needs and other circumstances of each and every line separately. Overruling the arguments, this Court said (197, 199):

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each

carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them.

* * * * *

Fourth. It is asserted that the order directs a transfer of revenues of the western carriers to the New England carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under § 15 (6), the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one. Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing.

The questions sought to be raised in this case do not reach the heights of the questions raised in the *New England Divisions Case* or the case of *United States* v. *Abilene & Southern Railway*, 265 U. S. 274. In the former the divisions of the lines east of the Hudson were inadequate and the increase of 15 per cent was ordered. The New England lines were the sufferers. Similarly in the latter case. The Kansas City, Mexico & Orient was bankrupt and the order of the Commission sought to increase its divisions. The Court adhered to its opinion in the *New England Divisions Case*, but due to evidence which the Commission had placed in the record and considered in reaching its decision of which the defendant carriers had not been apprised, it was held that they had not been accorded the hearing provided by the statute.

In the instant case the divisions of the appellant have been fixed on a record which was largely made by appellant and of which it cannot complain. It would seem beyond its power to challenge the order because the Commission had not conducted a similar hearing with respect to the properties of the Louisiana Western and Kansas City Southern which, this Court pointed out in the *New England Divisions Case*, was not only unnecessary but impossible if the statute was to be given effect.

Learned counsel say (Br. 33): "The rates and divisions increased as a result of the report in *Ex parte 74* were reduced in a similar manner by percentages in *Reduced Rates, 1922*, 68 I. C. C. 676."

In its first report, dated April 4, 1922, the Commission, after setting forth the then existing divisions, said: "The divisions include the increases of 35 per cent under the general increases of 1920." (68 I. C. C. 384; R. I, 51.)

Due to the reduced rates of 1922, the divisions prescribed in the final order of December 14, 1925, were made lower than those fixed by the previous order of March 10, 1924. The statute provides, " And in cases where the joint rate, fare, or charge was established pursuant to a *finding* or order of the Commission and the divisions thereof are found by it to have been unjust, * * * the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof," etc.

This record sustains the holding of the District Court (17 F. (2d) 165) that the divisions were of joint rates which were established pursuant to the findings of the Commission in *Ex parte 74* and *Reduced Rates, 1922*. The action of the Commission, therefore, in making its order retroactive as of August 1, 1921, was clearly authorized by the statute. In its final report the Commission said (104 I. C. C. 433, 434; R. I, 123, 124):

> The Brimstone contends that we are without jurisdiction and authority to prescribe divisions of joint rates, except for future application. This view is based on the

theory that the joint rates in question were not established pursuant to an order from us. All of the joint rates here considered were established pursuant to our findings under *Increased Rates, 1920*, 58 I. C. C. 220. We have found in prior cases that rates so established come within the plain language of paragraph (6) of Section 15, which gives us power to require a readjustment of divisions for the period subsequent to the date the investigation was instituted where the joint rates were established pursuant to a finding or order by us. *New York Dock Ry.* v. *B. & O. R. R. Co.*, 89 I. C. C. 695, and *Marion & Eastern R. R. Co.* v. *C. & E. I. R. R. Co.*, 96 I. C. C. 402.

CONCLUSION

The decree should be affirmed and the stay order should be vacated.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1927.

○

Supreme Court, U. S.
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No. 240

In the Supreme Court of the United States

OCTOBER TERM, 1927

THE BRIMSTONE RAILROAD AND CANAL COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, LOUISIANA WESTERN RAILROAD COMPANY, KANSAS CITY SOUTHERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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2. Where the separate fixing of an industrial carrier's division results in an increased proportion going to the trunk-line carriers, due consideration of the factors named does not require the submission of the same involved cost studies and detailed evidence in respect of the thousands of miles of road operated by the trunk lines as was found practicable in separately fixing the division of the industrial line, for, on the one hand, the interests of the trunk lines and that of the public in their efficient service has been promoted by the action taken, and, on the other hand, the fair return of the industrial line and interest of the public in its efficient service has been safeguarded by careful consideration given to de-
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lished in just such general rate-group proceedings, wherein aggregate carrier needs and property values constitute the prescribed rate bases and individual carrier needs are necessarily disregarded for the time being 34

3. The divisions received during the proceedings were subject to adjustment by the Commission despite the fact that appellant had, for the same years, made tentative payments into a reserve fund and to the Commission of excess income estimated by it to be subject to the so-called recapture clause of the Act, for recapture operates only against excess income shown following any such adjustment of divisions, and the tentative disposition of excess income made by the carrier could be readily readjusted, particularly since the Commission had not itself as yet found and determined what amount, if any, of the Brimstone's revenues was subject to the recapture clause 41

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 240

THE BRIMSTONE RAILROAD AND CANAL COMPANY, appellant

v.

THE UNITED STATES OF AMERICA, LOUISIANA WESTERN Railroad Company, Kansas City Southern Railway Company, and Interstate Commerce Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

The opinions delivered in the Court below are reported in 13 Fed. (2d) 914 and 17 Fed. (2d) 165. (R. 130, 322.)

STATEMENT OF THE CASE

This is an appeal under the Act of October 22, 1913 (38 Stat. 219), from a decree of the District Court for the Western District of Louisiana, Lake Charles Division, consisting of Circuit Judge Walker, and District Judges Burns and Dawkins, denying, upon submission for a final decree, an application by the appellant railroad for an injunction to set aside an order of the Interstate Commerce Commission, dismissing the bill of complaint and dissolving a preliminary injunction theretofore issued. The Commission order complained of fixed the just, reasonable, and equitable divisions of appellant in respect of joint rates in effect as of the commencement of the proceeding, August 1, 1921, and, separately, in respect of joint rates in effect after July 1, 1922, when previously existing joint rates were reduced, and required adjustment of divisions to the bases so fixed for the period subsequent to the commencement of the proceeding as well as for the future. (R. 127.)

Appellant, hereinafter called the Brimstone, operates a railroad in southwestern Louisiana which affords connections between the plant of the Union Sulphur Company, hereinafter called the Sulphur Company, and two trunk lines—namely, the Louisiana Western Railroad Company, a subsidiary of the Southern Pacific Company, and the Kansas City Southern Railway Company, which said two trunk lines are hereinafter called the Southern

Pacific and the Kansas City Southern, respectively. (R. 2.)

The Brimstone's main line consists of the Brimstone Division of 0.75 mile, extending from the Brimstone's track scales to Brimstone Junction, where connection is made with the Southern Pacific, and the Lockport Division of 6.64 miles, extending from the track scales to Lockport Junction, now called Mossville, where connection is made with the Kansas City Southern. (R. 43.) The road also owns 1.68 miles of spurs and sidings (R. 2) and, under agreements, operates over certain tracks of the Sulphur Company and certain tracks of the Southern Pacific and Kansas City Southern at points of connection with those railroads. (R. 2.) Approximately, 98 per cent of the tonnage carried is shipped by or to the Sulphur Company. (R. 147, 712.) The Sulphur Company owns 1,995 shares of the Brimstone's 2,000 shares of capital stock and the remaining 5 shares are owned by officials, three of whom are likewise officials of, and receive the major portion of their salaries from, the Sulphur Company. (R. 707.)

PROCEEDINGS BEFORE THE COMMISSION

The Commission proceeding was instituted August 1, 1921, by order of the Commission, issued on its own motion, directing investigation of the justness, reasonableness, and equitableness of the divisions of joint rates received by the Brimstone. (R. 336.) The joint rates in effect at the com-

mencement of the proceeding were established pursuant to the Commission's findings in *Increased Rates, 1920* (Ex Parte 74), 58 I. C. C. 220, which authorized a general increase in rates amounting to 35 per cent for this territory. (R. 124, 172, 180.) Joint rates in effect subsequent to July 1, 1922, were those established pursuant to the Commission's findings in *Reduced Rates, 1922*, 68 I. C. C. 676, recommending and authorizing a reduction of 10 per cent. (R. 93, 73.) Subsequent to said latter proceeding the divisions received by the Brimstone applicable in respect both of traffic moving over the Southern Pacific and the Kansas City Southern were as follows:

> On sulphur to gulf ports for coastwise or export movement, 24.3 cents per gross ton, equivalent to 1.085 cents per 100 pounds and to $10.85 per car of 100,000 tons capacity.
>
> On sulphur to other points, 2.7 cents per 100 pounds, or $27.00 per car.
>
> On fuel oil, 1.2 cents per 100 pounds.
>
> On brick, coal, and stone, 2.4 cents per 100 pounds.
>
> On cement, 3 cents per 100 pounds.
>
> On all other carload traffic, 3.6 cents per 100 pounds.
>
> On merchandise less than carloads, 12 cents per 100 pounds. (R. 73.)

Prior to July 1, 1922, the Brimstone's divisions were 10 per cent higher. (R. 51, 73, 93.)

The Brimstone's haul on traffic moving over the Southern Pacific is about 1.5 miles, exclusive of an

out-of-line movement necessary to reach the track scales. The haul on traffic moving over the Kansas City Southern, which requires no out-of-line movement to reach the scales, is about 7.5 miles. (R. 55.)

The Kansas City Southern and Southern Pacific were made respondents with the Brimstone. (R. 41.) The Texas Gulf Sulphur Company, owner of a sulphur mine at Gulf, Texas, 3.5 miles from Gulf Hill on the Gulf, Colorado & Santa Fe Ry., and performing its own carrier service to and from Gulf Hill, for which it received no allowance, participated in the earlier hearings, urging (1) that the Brimstone is a plant facility of the Sulphur Company and entitled to no allowance or divisions, and (2) that if it is entitled to any divisions or allowance, the amount should be limited to $4.50 per car, the switching charge prescribed in the *Tap Line Cases*, 31 I. C. C. 490, for over 1 to 3 miles. (R. 41.) The Louisiana Public Service Commission was also represented at the earlier hearings, and urged that Brimstone should be recognized as a common carrier. (R. 42.)

The Commission's first report in the proceeding, 68 I. C. C. 375, found the Brimstone to be a common carrier, but that divisions received by it were excessive and to the extent that they exceeded the cost of service, and a fair return, in effect, a rebate to the Sulphur Company. (R. 40.) In making this finding the report comments on the fact that dividends of 100 per cent in 1914, 60 per cent in 1917, and 40 per cent in 1918

were declared, and that a credit balance to profit and loss of $165,378.82 was shown as of December 31, 1920. (R. 49, 55.) Furthermore, the record showed that the company's notes issued for construction of its road and a canal, later abandoned, had been fully paid off. (R. 167, 49.) The record was held open 90 days to permit the respondents to make the necessary cost studies to arrive at reasonable divisions. Such cost studies were prepared and filed, and thereafter further hearings and oral argument were had and briefs were submitted. The report and order of the Commission on further hearing, 88 I. C. C. 62, dated March 10, 1924, found existing divisions unjust, unreasonable, and inequitable, prescribed reductions and required that adjustments be made in accordance therewith for the period subsequent to the commencement of the proceeding, namely, from August 1, 1921. (R. 57, 75.)

The Brimstone filed exceptions to the Commission's jurisdiction, questioning, as here, the Commission's authority to adjust divisions, under the circumstances obtaining in this case, for the period subsequent to the commencement of the proceeding, and alleging that it had made payments, pursuant to section 15a of the Act, of excess income received from divisions in effect prior to the adjustment. (R. 87–100.) The Brimstone also filed a petition for further hearing, and pursuant thereto the proceeding was reopened. (R. 76, 102.) The Commission's experts conducted tests and prepared cost

studies which were served upon respondents. Respondents prepared and submitted rebuttal evidence. Additional hearings were had and the views of respondents were further presented to the Commission in oral argument. (R. 102.) The Commission's third report, 104 I. C. C. 415 (R. 100), found that somewhat lower divisions on carload lots than those prescribed by its earlier order were warranted by the complete record then before it. Its final order (R. 127), dated December 14, 1925, vacated its earlier order, prescribed the following divisions, and required adjustment to the bases so fixed for the period subsequent to the commencement of the proceeding:

From August 1, 1921, to July 1, 1922

Traffic moving over the Southern Pacific: On all carloads, $7.78 per car; on merchandise, less than carloads, 11.5 cents per 100 pounds. Traffic moving over the Kansas City Southern: On all carloads, $10.00 per car; on merchandise, less than carloads, 15.5 cents per 100 pounds.

On and after July 1, 1922

Traffic moving over the Southern Pacific: On all carloads, $7.00 per car; on merchandise, less than carloads, 10.5 cents per 100 pounds. Traffic moving over the Kansas City Southern: On all carloads, $9.00 per car; on merchandise, less than carloads, 14 cents per 100 pounds.

PROCEEDINGS IN THE LOWER COURT

On February 15, 1926, the Brimstone filed a bill in the court below praying for an interlocutory injunction and a permanent injunction to set aside the order. (R. 1.) The United States, the Southern Pacific, and the Kansas City Southern were made defendants. The Interstate Commerce Commission intervened as defendant and filed answer. (R. 692.) The court, consisting of the judges above named, heard and granted the application for an interlocutory injunction and rendered an opinion (Circuit Court Judge Walker dissenting) to the effect that the Commission was without authority under the circumstances obtaining to make its order effective from the date of the beginning of the investigation. (13 Fed. (2d) 914.) (R. 130.) On May 31, 1926, the court entered its decree enjoining the Commission's order pending the further action of the court in the premises. (R. 143.) Upon submission of the case for final decree the court held (District Judge Dawkins dissenting) that the Commission order was not invalid and that the petition should be dismissed. (17 Fed (2d) 165.) (R. 322.) On January 19, 1927, the court entered its decree dismissing the bill and vacating the interlocutory injunction theretofore issued. (R. 325.)

APPELLANT'S CONTENTIONS

Appellant's contentions may be summarized as follows:

I. The Commission's order is invalid because the Commission fixed separately the Brimstone's divisions only, and because it did not investigate and determine the justness, reasonableness, and equitableness of divisions as between all carriers partcipating in the joint rates with relation to the factors named for due consideration in paragraph (6) of section 15 of the Act.

II. That part of the Commission's order adjusting divisions of joint rates for the period subsequent to the commencement of the proceeding is invalid—

(*a*) Because the statute, in so far as it authorizes the Commission to give its orders such retroactive effect, is unconstitutional.

(*b*) Because such unusual authority should, in any event, be narrowly construed and, since, it is in words conferred only in cases where the joint rates involved were "established pursuant to finding or order of the Commission," its exercise should be confined to adjusting divisions of such joint rates as have been specifically and individually established by the Commission, whereas the divisions, and adjustment thereof, herein prescribed, were out of joint rates established pursuant to Commission proceedings authorizing general rather than specific rate changes, conducted under section 15a(2).

(*c*) Because the so-called recapture clause of section 15a of the Act, requiring that a particular

disposition be made of earnings in excess of 6 per cent on property value, automatically reduced divisions to the point of reasonableness, and, since the Brimstone had made such statutory disposition of its excess income for certain past years, the Commission was without authority to order retroactive adjustment of divisions for those same years, thereby directing a different disposition of excess income than that provided for by section 15a.

III. The Commission's order is invalid because the divisions prescribed do not permit of a fair return upon the fair value of the Brimstone's property.

1. The property value base used by the Commission was improper, and no finding of the amount thereof was made.

2. The Commission's allowance for operating expenses was too low, and evidence in respect thereof for the years 1924 and 1925 was not before the Commission.

ARGUMENT

SUMMARY

I. The Commission, in fixing the divisions, gave the due consideration required by the Act to operating efficiency, revenue requirements for expenses plus a fair return, public importance, and other factors named in the Act, in respect of the carriers participating in the joint rates.

1. Where the need for action is merely the fixing of an industrial short line's division, the Commis-

sion may fix separately such division while regarding the remainder of the joint rate as a joint division or joint proportion going to the carriers participating in the traffic beyond the industrial carriers' junction with the connecting trunk line, and in such case due consideration is given to the factors named by respectively considering the adequacy with relation to those factors of the separate division for the individual needs of the industrial carrier, on the one hand, and the adequacy with relation to those factors of the remaining proportion for the joint needs of the remaining carriers, on the other hand.

2. Where the separate fixing of an industrial carrier's division results in an increased proportion going to the trunk-line carriers, due consideration of the factors named does not require the submission of the same involved cost studies and detailed evidence in respect of the thousands of miles of road operated by the trunk lines as was found practicable in separately fixing the division of the industrial line, for, on the one hand, the interests of the trunk lines and that of the public in their efficient service has been promoted by the action taken and, on the other hand, the fair return of the industrial line and interest of the public in its efficient service has been safeguarded by careful consideration given to detailed evidence.

3. In reducing the Brimstone's division and consequently fixing an increased proportion for the remaining carriers the Commission gave, with rela-

tion to the factors named, the due consideration to the Brimstone's requirements and to the joint requirements of the remaining carriers which the act called for under the circumstances obtaining.

II. The authority to adjust divisions for the period subsequent to the commencement of the proceeding conferred upon the Commission by the Act was not illegal in itself and was not exercised in an unauthorized manner.

1. Such adjustment of divisions was not retroactive in the sense that it took from the Brimstone revenue to which it was ever properly entitled.

2. The divisions and adjustment thereof ordered by the Commission were of joint rates established pursuant to findings or orders rendered by the Commission in certain general rate group proceedings, known as *Increased Rates, 1920*, 58 I. C. C. 220, and *Reduced Rates, 1922*, 68 I. C. C. 626, thereby strictly conforming not only with the letter of the divisions paragraph of the Act but to its purpose as well, which is particularly directed toward effecting distribution commensurately with individual carrier needs of revenues derived from rates established in just such general rate group proceedings, wherein aggregate carrier needs and property values constitute the prescribed rate bases and individual carrier needs are necessarily disregarded for the time being.

3. The divisions received during the proceeding were subject to adjustment by the Commission despite the fact that appellant had, for the same

years, made tentative payments into a reserve fund and to the Commission of excess income estimated by it to be subject to the so-called recapture clause of the Act, for recapture operates only against excess income shown following any such adjustment of divisions and the tentative disposition of excess income made by the carrier could be readily readjusted, particularly since the Commission had not itself as yet found and determined what amount, if any, of the Brimstone's revenues was subject to the recapture clause.

III. The Commission's order is supported by the evidence and amply provided for a fair return upon the fair value of the Brimstone's property.

1. Appellant was accorded full opportunity to submit evidence in respect of property value, and all applicable elements of value and judicially sanctioned methods of determining value were given consideration by the Commission.

2. Such adjustments as were made by the Commission in items charged to operating expenses were warranted by the evidence.

(*a*) The plant switching performed for the sulphur company necessitated close scrutiny of the costs as apportioned between common-carrier service and plant service.

(*b*) The allowance for maintenance of leased tracks was liberal.

(*c*) Annual charges to operating expense for the amortization of the investment were not warranted under the circumstances shown to exist in this case.

I

The Commission, in fixing the divisions, gave the due consideration required by the Act to operating efficiency, revenue requirements for expenses plus a fair return, public importance and other factors named in the Act, in respect of the carriers participating in the joint rates

1. Where the need for action is merely the fixing of an industrial short-line's division, the Commission may fix separately such division while regarding the remainder of the joint rate as a joint-division or joint-proportion going to the carriers participating in the traffic beyond the industrial carriers' junction with the connecting trunk line, and in such case due consideration is given to the factors named by respectively considering the adequacy, with relation to those factors, of the separate division for the individual needs of the industrial carrier, on the one hand, and the adequacy, with relation to those factors, of the remaining proportion for the joint needs of the remaining carriers, on the other hand.

What is known as the divisions paragraph of the Interstate Commerce Act, section 15(6), reads as follows:

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property,

are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance

> which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

The contention of the appellant that the Commission did not establish rates on the basis of their justness as between it and the other parties to the joint rates and did not give consideration to the factors named for consideration in the above quoted section relative to the respective operating efficiency, revenue requirements for expenses and a fair return, public importance, and status as originating, intermediate or delivering carrier of the railroads participating in the joint rates, is in part based on the grounds that the Commission's order initiating the proceeding (R. 336) called for an investigation of the Brimstone's divisions only, and that its order prescribing divisions (R. 127) fixed the divisions of the Brimstone only.

The order of investigation and that fixing divisions were worded properly. Of the individual carriers participating in the joint rates only the Brimstone's divisions were intended to be or were in fact separately fixed, the remainder of the joint rates being undivided proportions jointly going to the other participating carriers.

This handling of the situation is clearly approved in the *New England Divisions Case*, 261 U. S. 184. There the dividing point was the Hudson river, all carriers east of the Hudson having their divisions increased by a percentage taken from the joint pro-

portions of carriers west of the Hudson. The divisions of the former were separately and specifically fixed, whereas the carriers west of the Hudson were left with decreased joint proportions to be divided among them "in the same proportions as at present, or otherwise as they may agree, or failing such agreement, as may be determined by the Commission upon application therefor." In the instant case the dividing points are at the junctions of the Brimstone with its two connecting carriers. The Brimstone's divisions are separately fixed and the remaining proportions, which are increased rather than decreased, are left for voluntary division by and between the participating carriers on the other side of the junction points. It is true that in the *New England Division's case* the separate divisions of the carriers west of the Hudson may be said to have been fixed in the Commission's order by reference, but this the court points out was not essential to the validity of the Commission's action. At pages 201–202 the opinion reads:

> The duty imposed upon the Commission does not extend beyond the need for its action. If the real controversy is merely how much of the joint rate shall go to the carriers east of the Hudson river and how much to carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves. It is obviously of no interest to the western carriers

> how those of New England decide to apportion their share; nor is it of interest to the eastern carriers how those west of the Hudson divide the share apportioned to that territory. If on these matters the carriers interested can reach an agreement and no public interest is prejudiced, clearly, there is no occasion for the Commission to act.

If in the case quoted from immediate Commission action need not have extended beyond the fixing of the divisions east of the Hudson, equally, or perhaps more forcefully, it may be said that here the need for action did not extend beyond the fixing of the Brimstone's divisions, keeping in mind that the Brimstone is a short line, owned by the company furnishing substantially all of its traffic, and that the Commission is frequently called upon to adjust the divisions of so-called industrial carriers in order to guard against rebates and can not in all reason be expected to fix separately in each such case the innumerable divisions of the other carriers participating in the many joint rates that may be involved.

Unquestionably, therefore, the Commission followed the only practicable, and an entirely proper, method in adopting the Brimstone's junctions with its connections as a dividing point, fixing the Brimstone's divisions separately and leaving the remainders of the joint rates as joint proportions to be divided pursuant to the voluntary agreement of the carriers participating in the carriage beyond that point. It follows from this that the question,

properly raised, is as to whether the Commission did or did not give due consideration to the revenue requirements in rendering adequate service to the public and for a fair return, and other factors named, in respect of the Brimstone, on the one hand, and the other participating carriers, jointly and not separately considered, on the other hand.

> 2. Where the separate fixing of an industrial carrier's division results in an increased proportion going to the trunk line carriers, due consideration of the factors named does not require the submission of the same involved cost studies and detailed evidence in respect of the thousands of miles of road operated by the trunk lines as was found practicable in separately fixing the division of the industrial line, for, on the one hand, the interests of the trunk lines and that of the public in their efficient service has been promoted by the action taken and, on the other hand, the fair return of the industrial line and interest of the public in its efficient service has been safeguarded by careful consideration given to detailed evidence.

The Brimstone's claim appears to rest chiefly on the thought that the Commission should have had before it the same elaborate cost studies and abundant evidence in respect of the thousands of miles of road operated by the trunk-line carriers as were introduced in respect of the few miles of road operated by the Brimstone. Disregarding the fact that it was open to the Brimstone to have submitted

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any evidence relative to those other carriers which would have supported its right to a higher proportion, it seems clear that, reasonably construed, the statute does not require any such wasteful and futile expenditure of carrier time and money in fixing the divisions to be accorded an industrial line by its trunk-line connections. Because of the simplicity of its operations and its small plant, substantially correct mathematical results in respect of the Brimstone's operations could be obtained through cost studies. But it is clear that cost studies apportioning and reapportioning the operating costs of vast trunk-line systems in an effort to separate one specie of traffic from the entanglements of the other innumerable services rendered may not be resorted to with any expectation of like good results.

Clearly, where, as here, the fixing of the division on the one side of the dividing point results in an increased rather than a decreased joint proportion left for the carriers on the other side of that dividing point, less detailed consideration of the factors named in the divisions paragraph with relation to the proportion jointly available to the remaining carriers than that given to the fixing of the individual division, may constitute the due consideration required of the Commission by the statute. That this is true is shown by the fundamental purpose sought to be attained by the provisions of the Act relating to divisions.

The Transportation Act, 1920, revamped the Interstate Commerce Act chiefly with the purpose of aiding in the building up of an adequate transportation service and sought to accomplish that result without burdening the commerce of the country with excessive rates. The weak as well as the strong roads were essential to the country's transportation, and yet, due to their lesser efficiency, the revenue needs of the weak roads for a given amount of service were greater than the needs of the strong roads. These greater needs of the weaker roads could not be met, however, by a higher grading of their rates, because traffic would thereby be diverted to the lower rates of the stronger roads and congestion would follow. They could not be met by uniform rates established at the high level of the needs of the weakest link of the transportation system, because such rates would be more than adequate for the other carriers and burdensome to commerce. The Act prescribes the adjustment of rates to be based in effect on the requirements of the carriers as a whole, or as a whole within designated rate groups. Economic considerations demanded such rates because they mete out exact justice as between the carriers considered as a whole and the shipping public. But, within the ranks of the carriers the strong, under such average rates, would still be earning more than a just return while the revenue of the weak in many instances would not offset their operating expenses. The Act meets this contingency by provisions intended to bring

about a distribution of earnings derived from the uniform rates as fixed, more nearly commensurate with the needs of the individual carriers. In part this is to be effected through the recapture provisions (Section 422, Transportation Act, Section 15a, Interstate Commerce Act) and in part through the Commission's authority to fix divisions of joint rates as between the participating carriers. *New England Divisions Case*, 261 U. S. 184, 191; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456.

If, then, the Commission's investigation of the Brimstone's situation had developed the fact that it should be classed as a weak road requiring a larger share of the joint rate for its continued operation than its share of the service rendered would otherwise have warranted, it is apparent that the importance of its continued operation in the public interest would have become paramount (*Dayton-Goose Creek Ry.* v. *U. S.*, *supra*, p. 477; *New England Divisions Case*, *supra*, p. 195), and that, moreover, before allowing it a division, disproportionate to the service rendered, out of the proportion of the other carriers, even the most remote parties to the innumerable joint rates should have been made respondents and close and careful consideration should have been given to the possible results of reduced earnings upon those other carriers along the line indicated by the factors named in the Act, namely, whether the reduction would cut their net income below a fair return and even endanger their

continued operation in the public service, or whether it could be, to a large extent, offset by more efficient operation. However, Commission action need not extend beyond the need therefor (*New England Divisions Case, supra,* p. 201), and early in the Commission's investigation it was disclosed that the Brimstone's division was not inadequate but, on the contrary, so excessive that the Commission, in its first report, felt constrained to declare that they, in effect, amounted to rebates to the parent sulphur company. Since the change in divisions indicated by the evidence was toward a decrease in the Brimstone's proportion and a corresponding increase in that of its connections, the situation called for close consideration of the factors named in the Act with relation to the Brimstone in order to insure that its fair return and continued operation in the public interest would not be endangered, but, in so far as the remaining carriers were concerned, the due consideration of said factors required by the Act was not so exacting, since neither the public interest in their continued operation nor their fair return could be endangered by increased revenues.

The purpose of Congress in naming said factors for the due consideration of the Commission was not, as appellant seems to think, to assure each carrier of a share which would be equitable, regarded solely as between it and other participating carriers regardless of whether that share would yield it more than a fair return, but was, on the

contrary, primarily directed toward effecting a distribution of revenues commensurate with the needs of individual carriers, limiting the strong to a fair return and aiding the weak to more efficient operation in the public interest, even though, in so doing, certain carriers might be given divisions "larger than justice merely as between the carriers would suggest." *United States et al.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. Accordingly, once the Brimstone's continued and efficient operation in the public interest and its fair return on property value was provided for, its right could not be enlarged by a consideration of the factors named with relation to the other participating carriers. Certainly the naming of said factors for consideration was not intended to vest a carrier with the right to revenues greater than needed, both from the standpoint of fair return and from the standpoint of the public interest in its transportation service.

> 3. In reducing the Brimstone's division and consequently fixing an increased proportion for the remaining carriers the Commission gave, with relation to the factors named, the due consideration to the Brimstone's requirements, and to the joint requirements of the remaining carriers which the act called for under the circumstances obtaining.

Based upon exhaustive consideration of a large volume of detailed evidence, as will later be shown,

the Commission fixed divisions for the Brimstone which provided ample revenues, under efficient management, to meet the expenses of rendering proper service to the public and to yield a fair return upon property value. These requirements of the Brimstone were balanced against those of the remaining carriers, jointly considered, in such manner, as to ensure with practical certainty justice as between the carriers and the public interest in an adequate transportation service.

It is true that the same close scrutiny as was given the Brimstone's operations with relation to the factors named in the Act was not given to the operations of the trunk line carriers, but this was not necessary since their interests and that of the public in their efficient operation was promoted rather than endangered by the increased proportion of the rates accorded to them. Even if such close scrutiny had been given and had disclosed that that proportion showed a surplus above the needs of the trunk line carriers that fact would afford grounds, not for giving the Brimstone a greater division, but for reducing the joint rates. However, expensive cost studies in respect of the trunk lines could not be justified for that purpose either for that would *place the cart before the horse*. Division proceedings do not lead up to, but are, on the contrary, an outgrowth of, rate proceedings. As stated in the *New England Divisions case*, *supra*, p. 196, wherein as here the earlier rate proceeding was *Ex Parte 74*, *supra*, an order in a later divisions

proceeding may properly be regarded as supplemental to or a modification of the order in the earlier proceeding fixing the joint rates. The instant divisions proceeding, then, being in the nature of a supplemental proceeding, the Commission was warranted in considering that, to the extent that the joint rate fixed in the earlier proceeding correctly measured the aggregate needs of all carriers, parties to the rate, the remainder of that joint rate left after it had accurately fixed the Brimstone's proper division, correctly measured the joint needs of the remaining carriers.

We are mindful of appellant's claim that the finding of reasonable aggregate rates in *Ex Parte 74* does not necessarily determine the reasonableness of any particular rate. Nevertheless two things would seem to offset that claim even if conceded to be true: (1) That appellants and the other participating carriers accepted the rates involved here as reasonable for the joint service by establishing them without protest pursuant to what was a recommendation, not an order, contained in the Commission's findings rendered in *Ex Parte 74;* and (2) that the issue in the divisions proceeding was as to the proper division to be made of a given whole, already fixed in the rate proceeding, creating, it would seem, at least for the purposes of the supplemental divisions proceeding, a presumption that the given whole correctly measured the joint needs of all among which it was to be divided. From that it followed that, since the division was

to be made, primarily based on the operating needs of the respective carriers and the public interest in those operations, the accurate fixing on such basis of the division of one carrier left a remainder which presumptively represented the needs of the remaining carriers. Detailed consideration of the factors named in the act with reference to the connecting carriers could not, on the one hand, vest the Brimstone with rights to a division greater than needed for its fair return and efficient operation in the public interest, nor, on the other hand, justify a reduction of that division below its needs for efficient operation and a fair return. *U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274, 285; *Dayton Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 477. It was not necessary to separately fix the individual divisions of the Brimstone's connections, for the Commission's duty does not extend beyond the need for its action, *New England Divisions case, supra*, pages 201, 202. Those separate divisions may be fixed when occasion arises and if the needs of the Brimstone's connections prove to be greater or less than the balance of the joint rate left them after the fixing of the Brimstone's division that will give cause, not for disturbing the Brimstone's division of the joint rate as it now exists, but for instituting a proceeding wherein the level of the total joint rate may be properly considered.

All that is here contended is that, because of the supplemental nature of the divisions proceeding, the accurate fixing of this one road's division leaves

a balance that presumptively—not conclusively—represents the proper needs of the remaining carriers, jointly considered. The existence of a presumption is sufficient to show the due consideration required by the act of the factors named with reference to the vast trunk-line systems where, as here, the need was only for the fixing of what was tantamount to a mere switching charge.

The above might not be true if, as in the case of *United States* v. *Abilene & Southern Ry. Co., supra*, the proportion going to the remaining carriers had been reduced thereby endangering their fair returns and adequate service to the public. But here the interests of the remaining carriers and that of the public in their service was promoted by an increased proportion and there was, therefore, no need for further action to protect their interests and no warrant for a large outlay of carrier revenue in preparing detailed evidence of their costs. Moreover, such due consideration of the factors named in the Act is otherwise disclosed by the record.

Existing division sheets showing divisions of all joint rates in which the Brimstone participated were before the Commission and an index to the tariffs of such rates. (R. 754, 336 (fol. 452), 718, 177.)

The cost studies showed the volume of traffic moving and its distribution between the Southern Pacific and Kansas City Southern.

Past division sheets back to 1906 were in the record showing that consideration was given to the

proportions considered just and equitable in the past for the Brimstone's needs, on the one hand, and the trunk lines, on the other hand. (R. 754–765, 716.)

There was testimony as to the divisions accorded the Brimstone in 1919 by the Director General, who then operated the Southern Pacific and Kansas City Southern and as to conferences with him relating thereto. (R. 170–173, 189–190.)

There was testimony of Southern Pacific and Kansas City Southern officials showing that, in their fixing of the Brimstone's divisions and divisions of short lines generally, competition—that is to say, the getting of the business—was the controlling element rather than the costs of the service, and that competition between the two trunk lines for Brimstone business was keen, from which the inference naturally followed that the divisions given to get that business were high and the proportions left for trunk-line needs were low for the service rendered. (R. 174–179, 182–185.)

The *New England Case* shows that it is not necessary for the Commission to announce that it had given due consideration to the factors named in the statute if such consideration should be normally and naturally presumed from its action in the premises. At page 202, referring to the fact that the divisions of carriers west of the Hudson were fixed by reference and provisionally only, the opinion reads:

> It is urged that this disposition demonstrates failure by the Commission to consider the several factors which the statute declares shall be taken into consideration in determining divisions. But this is not true. This feature in the order indicates rather that the Commission has considered the question, concluded that the apportionment by the western lines of their share on existing proportions was not inconsistent with the public interest; and that in the absence of complaint, it might be assumed to be satisfactory to all parties.

The very fact that the effect of the Commission's order was to give a larger proportion to the trunk-line carriers shows that the Commission gave consideration to the needs of, and public interest in, those roads.

Furthermore, the Commission declared that the divisions were in effect rebates, commenting on the fact that all notes issued for the construction of the road and a canal, later abandoned, had been discharged; that dividends of 100 per cent, 60 per cent and 40 per cent, had been declared in 1914, 1916, and 1917, respectively, and thereafter a surplus of $165,000 was shown at the beginning of the proceeding. (R. 55, 49, 167.) A rebate effected by giving an excessive division to a shipper-owned carrier necessarily means that the remaining carriers parties to the joint rates are relinquishing their proper shares of the rates based on their respective services.

And finally it is clear that the Commission, in declaring the divisions to be rebates, must have given due consideration to the final factor named in the act, namely, to the fact that the shipper-owned feeder or tap line was, as to sulphur, an originating carrier and the trunk lines intermediate or delivering carriers; and to the fact that the reverse was true as to inbound traffic.

II

The authority to adjust divisions for the period subsequent to the commencement of the proceeding conferred upon the Commission by the Act was not illegal in itself and was not exercised in an unauthorized manner

1. Such adjustment of divisions was not retroactive in the sense that it took from the Brimstone revenue to which it was ever properly entitled.

The authority conferred by Congress to adjust divisions, dating from the commencement of a proceeding is freely spoken of as being retroactive. But it is not retroactive in the sense that it takes from the Brimstone revenue to which it was ever properly entitled. Section 1 (4) of the Act makes it the duty of the carriers to establish just, reasonable, and equitable divisions. The Commission found that the Brimstone's divisions were unreasonable and, to the extent of the excess, in effect rebates to the parent sulphur company. (R. 56.) Throughout the Act rebates are denounced. Can it be said that the appellant is vested with inalien-

able rights to excess revenue received by reason of its failure in its statutory duty?

Appellant urges that the divisions in effect at the commencement of the proceeding, August 1, 1921, can not properly be regarded as inequitable, because they were given legal sanction by section 208 (b) of the Transportation Act, 1920, which provided that divisions of joint rates in effect February 29, 1920, should continue in effect until changed by mutual agreement or by state or federal authority. This provision is a corollary to section 208 (a) providing that rates in effect February 29, 1920, shall continue in effect until changed by state or federal authority or pursuant to authority of law. But the Brimstone's divisions, in effect at the commencement of the proceeding, were not those in effect as of February 29, 1920, for meanwhile the whole (namely, the joint rates), of which the divisions were a part, had been changed pursuant to findings made in *Ex Parte 74, supra,* and thereafter corresponding changes had been made in divisions. (R. 124, 172, 180.) Although based on the same proportions as formerly the new divisions were "changed" divisions of "changed" joint rates within the wording of the Act and within its intent as well. Such sanction as was given by the Transportation Act to existing divisions was an emergency measure designed to prevent general disruption of the rate structure following federal control. It was never intended to constitute such approval of the proportionate distributions then being made

of the revenues from joint rates as would afford legal sanction, if based on the same proportions, of new divisions of new joint rates.

Furthermore, the situation in this case is like that involved in the *New England Divisions Case, supra.* Since the general increase in the joint rates, herein involved, effected by *Ex Parte 74, supra,* took care of the needs of participating carriers considered as a whole only, the later divisions proceeding, by making the contemplated distribution of revenues as between the carriers, had the effect of completing the work which, except for practical reasons, should have been done in the one proceeding. The later divisions order is in effect supplemental to or a modification of the joint-rate order. *New England Divisions Case, supra,* p. 196. Since the Commission might have made such distribution in the one proceeding, the fact that it was done, dating from the commencement of a later supplemental proceeding, would seem to give cause for complaint only by carriers who would have benefited had the distribution been still earlier effected.

Recapture of excess earnings, as well as the prescribing of divisions, is relied upon by the Act to bring about the desired distribution of revenues derived from joint rates. *New England Divisions Case, supra,* p. 191. Recapture necessarily operates from the date of the establishment of the rates producing the revenues, and it has been held not to be unlawful. *Dayton-Goose Creek Ry.* v. *United*

States, 263 U. S. 456. It would seem to follow that Congress could have consistently authorized the adjustment of divisions even back to the date of the joint rates involved. The fact that it exercised moderation in this regard can not be urged against the validity of its action.

> 2. The divisions and adjustment thereof ordered by the Commission were of joint rates established pursuant to findings or orders rendered by the Commission in certain general rate group proceedings, known as *Increased Rates, 1920*, 58 I. C. C. 220, and *Reduced Rates, 1922*, 68 I. C. C. 626, thereby strictly conforming not only with the letter of the Act but to its purpose as well, which is particularly directed toward the distribution commensurately with individual carrier needs of revenues derived from rates established in just such general rate group proceedings, wherein aggregate carrier needs and property values constitute the prescribed rate bases and individual carrier needs are necessarily disregarded for the time being.

Because of its alleged retroactive nature appellant claims that paragraph (6) of section 15 should be strictly construed. The strict construction contended for is that Congress intended that adjustment of divisions from the commencement of a proceeding should be made only where the joint rates have been established pursuant to paragraphs (1) and (3) of section 15, after full and specific hearing in respect of each individual rate, as distinguished

from cases where the joint rates have been established pursuant to paragraph (2) of section 15a, authorizing general rate adjustments. This, it is urged, is shown by the fact that said paragraph (3), while prescribing the manner of fixing joint rates thereunder, at the same time authorizes the fixing of "the divisions of such rates, fares, or charges as hereinafter provided," the thought apparently being that the words "hereinafter provided" so links the later divisions paragraph, paragraph (6), with said paragraph (3) that divisions and the adjustment thereof could only be ordered out of joint rates fixed pursuant to paragraph (3).

It will be noted that in the phrase of paragraph (3), relied upon by appellant, it is the divisions of such rates which are to be fixed as hereinafter provided. Therefore appellant's rule that the Commission's authority over divisions under paragraph (6) is thereby restricted to the "divisions of such rates," individually established under paragraph (3), if applied at all, must be applied in respect of divisions *in futuro* as well as in respect of the adjustment of divisions. The divisions involved in the *New England Divisions case, supra*, were future divisions and they were of joint rates established pursuant to *Ex Parte 74*. Since they were approved by the court, it must be either concluded that the joint rates, established pursuant to Ex Parte 74, were established in the manner contemplated by paragraph (3), or that the phrase in paragraph (3), relied upon by appellant, is not

intended as a restriction upon the Commission's authority under the later paragraph (6). Undoubtedly when joint rates have been established pursuant to paragraphs (1) and (3) the divisions thereof must be fixed in accordance with the later division paragraphs, but it does not at all follow that those are the only divisions over which authority is given. Paragraph (6) shows a clear intent to authorize the fixing of future divisions in respect of joint rates, howsoever established, and limits the so-called retroactive adjustment only to the extent that the joint rates must have been "established pursuant to a finding or order of the Commission"; that is to say, they must have been in some manner authorized by the Commission.

The Commission has uniformly held that it could order adjustment of divisions, dating from the commencement of a proceeding, of joint rates established pursuant to its findings in *Ex Parte 74; New York Dock Ry.* v. *B. & O.*, 89 I. C. C. 695; *Marion & Eastern R. R. Co.* v. *C. & E. I. R. R. Co.*, 96 I. C. C. 402.

The joint rates herein involved were authorized in *Increased Rates, 1920* (*Ex Parte 74*) and *Reduced Rates, 1922, supra*, and were established by the carriers pursuant to the Commission's findings and authorizations in those proceedings. This is shown by the Commission's report (R. 124), by the testimony of witnesses (R. 172, 180), and by the admission of appellant (R. 92–94 and Brief 33–48). We are not contending, as appellant seems to think,

that the rates were established by the Commission. We contend that they were established by the carriers "pursuant to a finding or order of the Commission." The situation falls strictly within the terms of the statute. The condition precedent to the so-called retroactive adjustment of divisions is not that the joint rates must have been ordered by the Commission in the sense of having been required, but that they shall have been "established pursuant to a finding or order of the Commission." Accordingly compliance therewith is effected whenever rates are established pursuant to authorization, as well as requirement, contained in the Commission's findings or orders. Such rates, although not required, are nevertheless not voluntary in the sense of having been initiated by the carrier and, in the absence of protest, having become effective without formal investigation and affirmative approval of the Commission, for here, based upon its own findings, after investigation, the Commission authorized the rates and pursuant to such findings and authority they were established by the carriers.

Not only does the situation fall strictly within the words of the statute but it is also clear that it is just the situation in respect whereof Congress particularly intended that adjustment of divisions should be made dating from the commencement of the proceeding. Prior to the Transportation Act, 1920, the Commission might, in the case of tap lines, remove discriminations effected through preferential divisions, but aside from this the Com-

mission's guide in fixing divisions was solely the justness, reasonableness, and equitableness thereof as between the carriers participating in the joint rates. The Transportation Act recognized the public interest in an efficient transportation service by naming certain factors for the Commission's consideration (Sec. 418, Transportation Act, 1920; Section 15(6), Interstate Commerce Act), the effect whereof is to authorize, in cases where the public interest would be served, the giving to a weaker road of a division larger than justice merely as between the parties would suggest. *United States* v. *Abilene & So. Ry.*, 265 U. S. 274, 285. This shows that the present divisions paragraph is inseparably linked with that other paragraph (Sec. 15a(2)) added by the Transportation Act, providing for the adjustment of rates based on the aggregate needs of the carriers as a whole, or as a whole in designated rate groups, because, as shown above, the paring down of rates to the average needs of the carriers would endanger the continued operation of the less efficient carriers unless such distribution of the revenues derived as that contemplated by the new divisions provision were provided for. *New England Divisions Case, supra,* 191. In view of this close relationship, it seems inescapable that Congress intended to authorize such adjustment of divisions with especial reference to joint rates fixed pursuant to findings or orders rendered in just such general or rate group proceedings as were conducted in *Ex Parte 74* and

Reduced Rates, 1922, supra, particularly since it must have been foreseen that the innumerable divisions involved in a general proceeding could not be immediately fixed and that, accordingly, the distribution of revenues as between carriers, which theoretically should take effect contemporaneously with the effective date of the rate, would in practice be delayed. The adjustment back to the commencement of such a supplemental divisions proceeding is clearly designed to offset in a measure such delay.

Moreover, it is by no means conceded that the carriers were not accorded full hearing in respect of the joint rates established pursuant to *Ex Parte 74* and *Reduced Rates, 1922.* In the *New England Divisions Case* the court, in answer to the carrier's contention that the provisional character of the order demonstrated that the hearing had not been a full one, said at page 201:

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that upon further investigation some changes in it will have to be made.

Continuing, the court draws an analogy between that case and *Ex Parte 74,* as follows:

> To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues

pending a decision than was the like action, in cases involving general increases in rates, a transfer of revenue from the pockets of the shippers to the treasury of the carriers.

The rate changes found proper in *Ex Parte 74* and *Reduced Rates, 1922*, were applied to the rate structure generally, and therefore can not be said to have disposed of all issues completely and permanently. If, however, the general change did not fit the particular case, it was left to the carriers to apply for further adjustment of particular rates. On petitioner's own showing the changes authorized were not protested in respect of the joint rates here involved but were established pursuant to the permission given. (R. 93.) It can not, therefore, be consistently urged that the hearing was inadequate for the purpose sought to be attained in proceedings held pursuant to section 15a. It is not necessary to show that the kind of hearing contemplated by paragraphs (1) and (3) of section 15 was had in respect of the individual rates, for the condition precedent to the so-called retroactive adjustment of divisions is only that the joint rates must have been "established pursuant to a finding or order of the Commission." The joint rates under consideration were so established. They were established pursuant to findings rendered in section 15a proceedings and based on aggregate needs of the carriers, in respect whereof, as pointed out above, the divisions paragraph is particularly directed in order that the revenues from such average rates

may be distributed in closer conformity with the needs of individual carriers.

Before passing to the next chapter we desire to take issue with the statement on page 10 of appellant's brief that it was unnecessary for the lower court in granting the preliminary injunction to discuss any other grounds of illegality than those set out in paragraph II of appellant's brief. The court did base its preliminary injunction on the grounds urged in said paragraph II against the validity of the Commission's action in adjusting divisions back to the commencement of the proceeding. But we submit that the court erred in restraining solely on such grounds an order of the Commission in toto, which involved future divisions as well as the adjustment of divisions back to the commencement of the proceeding, and that this well demonstrates the fact that the court at the time it issued the preliminary injunction had not had adequate time to give full consideration to the many ramifications of this case.

3. The divisions received during the proceeding were subject to adjustment by the Commission despite the fact that appellant had, for the same years, made tentative payments into a reserve fund and to the Commission of excess income estimated by it to be subject to the so-called recapture clause of the Act, for, recapture operates only against excess income shown following any such adjustment of divisions and the tentative disposition of excess income made by

the carrier could be readily readjusted, particularly since the Commission had not itself as yet found and determined what amount, if any, of the Brimstone's revenues was subject to the recapture clause.

The Brimstone contends that the provisions of section 15a requiring it to pay one-half its excess net income, over six per cent of property value, to a reserve fund and to pay the remaining one-half to the Commission for the purposes therein outlined, automatically reduced its divisions to the point of reasonableness, and, since it had for certain years subsequent to the commencement of the proceeding made such disposition of its excess income, the Commission was without authority to reduce and adjust divisions for those same years because that would, in effect, be requiring a disposition of excess income, through the authority reposed in the Commission by section 15(6), different and inconsistent with the disposition of excess income provided for by section 15a.

The Commission's action in reducing divisions and in adjusting them for the period of the proceeding was not inconsistent with the purpose of the recapture clause. Certainly, in the case of rates or divisions for the future which have been reduced by the Commission, recapture would not operate against revenues that would have been earned by the carrier if the pre-existing rates and divisions had not been reduced. Clearly, the purpose of section 15a is the same in respect of reductions of

divisions effective from the commencement of the proceeding, namely, that recapture should operate against the reduced revenues and not against revenues derived from divisions which have been disapproved by the Commission and ordered to be equitably adjusted between participating carriers.

This evident purpose of section 15a is in nowise changed by the fact that the Commission, in order to effect tentative compliance with the recapture clause pending the unavoidable delay incidental to completing property valuations of the carriers, instructed the carriers to submit annual returns showing their own estimates of excess income and admonishing them to make disposition of the excess so shown in the manner provided for by the Act. The amount of such excess income is necessarily tentative until the Commission has itself determined the carrier's property valuation, as provided for by section 15a (4) and (6), and presumably until it has scrutinized, and adjusted or approved, the carrier's figures relating to operations. This is apparently admitted by the Brimstone. (R. 96.) Such determination of value and adjustment of operating accounts have not as yet been made. (R. 124, 96, and Brief 62, 63.)

Clearly no insuperable difficulty exists, either in readjusting in accordance with facts as finally determined the one-half of estimated excess income held by the carrier in a reserve fund or the one-half paid in to the Commission. The latter, it is true, has been placed in the custody of the Treasury De-

partment, but the Comptroller General has rendered opinion to the effect that the Treasury Department's authority over funds so deposited with it by the Commission extends no further than to see to it that withdrawals are made on proper requisitions, and to the further effect "that there could be no interference by the Secretary of the Treasury with the discretion and authority of the Commission in the administration of the fund." *Decisions of the Comptroller General*, Vol. 2, July 1, 1922, to June 30, 1923, page 360.

In the case of *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, this court upheld the validity of the recapture statute and the resulting authority of the Commission to order carriers to make returns of excess income. That the court was not passing upon the question as to whether payments of excess income, based on the estimates in such returns, were or were not final payments is shown by the fact that it makes clear that the only order of the Commission involved in the suit was that directing the carrier to make returns. The admonition to the carriers to make payment of the excess income shown which accompanied that order is separately referred to as a request. (Pp. 474–475.) The suit was instituted under the Urgent Deficiencies Act to set aside an order of the Commission. Accordingly, since there was no order for payment of excess income, the question of the finality of the payments made was not involved or

passed upon. *Los Angeles Valuation Case*, 273 U. S. 299.

III

The Commission's order is supported by the evidence and amply provided for a fair return upon the fair value of the Brimstone's property

The remainder of this brief deals with the issues relative to the sufficiency of the evidence and as to whether or not the divisions prescribed permit of a just return upon fair property value.

The Commission's first and second reports and the record discloses that there was submitted at the earlier hearings evidence showing, among other things—

The physical operations of the railroad in and about the plant of the sulphur company and at its junctions with the Southern Pacific and Kansas City Southern (R. 145–152, 708);

Its corporate relations with the sulphur company (R. 707, 145, 153–157);

The benefits of its service to the community as well as to the sulphur company (R. 152);

Its equipment and other property, original and reproduction costs thereof and tax assessment valuations (R. 708, 709, 739, 353, 615, 722, 738, 739, 185);

Its balance sheet, August 31, 1921, and operating accounts for a period of years (R. 722, 724, 731, 507, 515, 619);

Kinds, volume, and movement of traffic (R. 47, 48, 712, 726, 658, 736, 741);

Local tariff and index to tariffs concurred in (R. 188, 336 (fol. 445, 449), 719);

Division sheets showing existing divisions of all joint rates in which the Brimstone participated (R. 754, 336 (fol. 452), 718, 177);

Division sheets showing divisions of joint rates for period subsequent to 1906 (R. 754–765, 716);

Record of conferences with United States Railroad Administration in fixing existing divisions (R. 170, 189, 712, 47);

Testimony of railroad officials relative to matters considered when fixing divisions accorded to short lines (R. 170–185); and

Cost studies based on actual test made on the ground (R. 59, 337, 343, et seq.).

Subsequently and prior to the final hearings Mr. Elmore and other experts of the Commission, in conjunction with representatives of the Brimstone, conducted a seven days' test and prepared cost studies based thereon. (R. 102, 255 et seq.) These studies were served upon respondent railroads and at the hearings rebuttal testimony and exhibits were introduced. (R. 589, 615, 619, 657, 661, 665, 671, 675, 678.)

The manner of conducting the tests and the scheme of the cost studies are fully outlined in the Commission's second and third reports (R. 58, 102) and will not be repeated here.

1. Appellant was accorded full opportunity to submit evidence in respect of property value, and all applicable elements of value and judicially sanctioned methods of determining value were given consideration by the Commission.

The Brimstone asserts that the Commission used as a basis of property value the book investment cost for 1923, without finding of value as provided by section 19a of the Act, and without giving due, if any, weight to increased cost of construction prevailing since 1914, in disregard of reproduction cost figures for 1921, 1922, and 1923, submitted by the Brimstone. The Brimstone also contends that the Commission, in its estimate of value, did not include a proper amount for working capital and entirely disregarded going-concern value.

The allegation that the Commission made no finding of value as provided in section 19a probably requires no answer. The Commission's work would practically come to a full stop if it were required to postpone action in respect of every carrier whose property value remained undetermined as provided by section 19a. The right of full hearing does not require that this section be first complied with. In the *New England Divisions Case*, 261 U. S. 184, the court said, at page 200:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and

law, of the step asked to be taken. The Commission recognized, and observed these essentials of a full hearing.

There is no basis for the assumption that the Commission reached its decision entirely upon book cost value or entirely upon evidence of value for any one year. The cost study of the Commission's experts was based on the Brimstone's investment-cost figures for 1923. The Commission's final report shows that it gave consideration not only to that evidence (R. 115) but also to the reproduction-cost figures which admittedly were before it for that and earlier years (R. 118). All of the Commission's reports show that the Brimstone's evidence was not disregarded but, on the contrary, was discussed and considered very fully in connection with other evidence bearing thereon which was before the Commission. (R. 49, 66, 118.) That the Commission did not disregard enhanced cost of construction is, in addition, shown in its final report where, after commenting on the fact that there was only a 10 per cent difference between actual investment as shown by the Commission's experts and the Brimstone's figures of cost of reproduction new, it is remarked that by far the larger proportion of cost in both cases represents equipment, practically all of which was renewed at the present higher basis of costs. (R. 119.) That the Commission has not based its conclusions exclusively on the book cost used by its own experts or the cost figures for any one year, but, on the contrary, has taken all the

evidence into careful consideration, is further shown by the fact that the divisions prescribed by the Commission are in excess of the costs of the service shown reasonable by the cost studies of the Commission's experts. (R. 116, 127.) In the *New England Division Case, supra,* the court, at pages 203 to 204, comments upon a like contention that the Commission's action was without evidence or in disregard of evidence, as follows:

> That the evidence was ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province.

Appellant does not charge that the Commission made no allowance for working capital. It claims only, and without giving detailed reasons therefor, that the amount allowed was improper. The very full discussion of this contention contained in the Commission's final report shows ample justification for the rejection of the amount estimated by appellant as necessary for working capital. (R. 114–115.) That report also shows as incorrect appellant's claim that the Commission disregarded going-concern value. Although the Commission considered that because of elements peculiar to the Brimstone's individual situation it had no going-concern value in the sense that ordinary businesses have such value, nevertheless it remarked that

"Such going-concern value as may represent an asset has been included, we believe, in the figures dealing with the cost of reproduction new less depreciation." (R. 120–121.)

2. Such adjustments as were made by the Commission in items charged to operating expense were warranted by the evidence.

The Brimstone, in connection with its general allegation that the divisions fixed by the Commission do not yield revenues adequate to meet operating expenses plus a fair return, particularly charges that the Commission failed to investigate operating expenses for the year 1922 and that there was no evidence before it in respect of operating expenses for the years 1924 and 1925 and no evidence of the number of cars handled during the year 1925.

Statements of operating expenses for a period of years, including the year 1922, were before the Commission. (R. 507, 665, 343.) The bases upon which the various items were charged were also before the Commission; for example, the percentage charged on the books to current depreciation, the arrangements between the Brimstone and the sulphur company for the payment of the salaries of joint officials, maintenance of joint offices in New York, maintenance of track and repair of equipment done by sulphur company for account of the Brimstone, and special studies in respect of engine service, which although properly plant service was charged to the carrier. (R. 63–69, 104–111.) It is true that the Brimstone's cost study and that of the

Commission's experts were based on 1920 and 1923 operations, respectively, and that the Commission's discussion of adjustments properly to be made, therefore, related particularly to those years. It does not follow from this, however, that the Commission failed to give consideration to 1922 operating expenses in connection with the evidence bearing upon the practice of the carrier in determining operating charges.

The allegation that operating expenses for 1924 and 1925 were not before the Commission is correct. The seven-day test of work performed by the Brimstone, on which the last cost study was based, was conducted in May, 1924, and naturally the 1923 operating expenses were the latest full year's operating expenses then available for use in connection with the cost study. When analyzed the basis of appellant's contention in this particular appears to be that the Commission must see to it that the evidence in a case is brought down to the very day of its order. This would assume that, in the case of each and every delay in rendering decision, howsoever occasioned, the record must be supplemented, perhaps entirely duplicated, to exactly reflect the immediate circumstances and conditions under which the carrier's operations are then being conducted. Any such practice is, of course, out of the question. It was not unreasonable to regard the operating expenses for the years 1920, 1921, 1922, and 1923 as typical of what might be expected for the two succeeding years. Further-

more, if the operating expenses for that period of years had shown a marked trend, upward or downward, that trend could have been allowed for in the Commission's decision.

Appellant's brief, page 53, claims that the divisions ordered by the Commission, when applied to the number of cars moved during 1923, would yield a total revenue of $167,069.50, as against operating expenses plus a fair return upon property value of $167,877.07, which it is alleged the Commission found the Brimstone was entitled to receive for the same year. It is noteworthy that the difference is only $807.57 and is after giving effect to a fair return on property value; that, moreover, the instance cited is confined to one year, whereas other years may well have made up the difference. Regulation is designed only to meet average conditions. It can not be expected to result in precise mathematical justice at the end of each calendar year. But aside from this, appellant's reference to the Commission's report (R. 104) shows that the 1923 operating expenses referred to were those submitted as proper in the cost study of the Commission's experts. The Commission made no finding in respect of the total amount submitted by its experts. On the contrary, some items going to make up that total were rather severely criticised, notably those based upon an apportionment of expense as between plant and carrier's service. (R. 116, 118.)

(a) The plant switching performed for the sulphur company necessitated close scrutiny of the costs as apportioned between common carrier service and plant service

The difference between the total of railway operating expenses claimed by the Brimstone and those found proper by the Commission's experts has its source largely in the different classifications made of the Brimstone's services as between carrier and plant services. The Commission's first report, citing the *Tap Line Cases*, 234 U. S. 1, as authority, observes that although the Brimstone is a common carrier its intimate affiliation with the Sulphur Company necessitates close scrutiny of its operations in order to guard against rebates. (R. 54.)

The Brimstone in its earlier cost studies separated operations into three zones, namely, zone 1 for Southern Pacific business, zone 2 for Kansas City Southern business, and zone 3 used in service to both trunk-line connections. The cost studies of the Commission's experts added a zone covering services within the plant and also made further separations of territory in order to more accurately allocate services between Southern Pacific and Kansas City Southern business. At the time when the proceeding was instituted the Sulphur Company was doing its own plant switching, but under an agreement made in 1923 the Brimstone assumed this service and also the maintenance of certain plant tracks. (R. 720, 256, 104.) This entailed the operation of an additional locomotive, and as a result thereof necessitated an apportionment of the wages

of its crew and fuel expense between plant and carrier service. Wtih regard to the apportionment of service as made by the Commission's experts, the Brimstone, although it took exception generally to the results reached, appears to have found only one concrete element on which it could base any complaint, namely, the fact that locomotive time, as spent in shifting cars from the hold tracks, so called, to the loading tracks, was classified as plant service. Mr. Glover, Division Superintendent of the Southern Pacific, and a Brimstone witness, stated that the allocation made in his exhibits as between plant and carrier service differed from the Commission's allocations only in that he classified this particular service as carrier service. (R. 291.) Yet it was later brought out through this witness that it was because of plant convenience that the loading tracks were not made large enough for the spotting of a full engine haul of cars at one time, which fact necessitated the use of hold tracks for the remaining cars of a full engine haul. (R. 123, 296–297.)

That the separation of carrier and plant service in the cost study of the Commission's witnesses was made upon a basis eminently fair to the Brimstone is illustrated by mention of certain instances. The Brimstone's gondola cars were used in handling sulphur from storage bin to conveyor pit for loading into box cars. The large locomotive was kept at the plant weighing scales while weights were adjusted to box-car capacity. Such services are properly attributable to the plant and should have been

so charged, particularly in view of the high maintenance costs charged to equipment by the Brimstone. Yet the Commission's expert testified that no deduction was made on account thereof. (R. 273–274, 117.) The small locomotive and its crew were kept on duty at the plant on Sundays. No sulphur was loaded on Sundays, and from a carrier standpoint there was no necessity for duty on that day. (R. 261.) Nevertheless, the cost study of the Commission's experts included 123 minutes of Sunday titme in carrier service. (R. 262.) The Commission, in its first report (R. 47), found that the back-haul movement to the track scales, which about doubled the movement to the Southern Pacific connection, should not be included in computing cost service, which finding was based on an earlier Commission decision which had been sustained as not unreasonable in *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 118. Despite this finding this element has not been excluded from the carrier's cost of service, either in the cost studies of the respondents or those of the Commission's experts.

In its final report the Commission, commenting on allocation of plant and carrier service made by its experts, says at page 427 (R. 116):

> The Brimstone explains that the consumption of substantially twice the amount of fuel oil in 1923 as in 1922 was caused by the additional intraplant service it performed in 1923. From this explanation it would

appear that about one-half of the service performed was intraplant instead of the small portion assigned by our experts, and that the cost of handling the cars to and from the two connections should be materially reduced from that shown by them.

(b) The allowance for maintenance of leased track was liberal

Appellant's brief, page 49, charges that the Commission excluded from the Brimstone's operating expenses for the year 1923 the actual costs paid by it for the maintenance of 2.76 miles of track used in its common carrier operations and substituted therefor an arbitrary estimate of what, in its opinion, that maintenance cost should have been.

The three pages of discussion devoted to this item in the Commission's report disprove the charge of arbitrariness. The evidence upon which the Commission acted and its reasoning are there fully set forth and call for no elaboration. (R. 104–107.) However, in refutation of appellant's apparent belief that the Commission was in duty bound to accept the amount charged on the Brimstone's books because they were actual costs paid under agreement for the maintenance work performed by the sulphur company, we call attention to the fact that under the divisions paragraph, sec. 15(6), it is the duty of the Commission to give consideration to economy in operation and that the Act as a whole and decisions of this court consider that a carrier is entitled to a fair return on its

property value only in case its operating expenses have been incurred under reasonably economical management.

(c) Annual charges to operating expense for the amortization of the investment were not warranted under the circumstances shown to exist in this case

The Brimstone's claim of right to set up an annual sum of $4,981.58 representing amortization of investment over a period of 21 years is likewise discussed in the Commission's final report. (R. 121–122.) It is there pointed out that if such sum had been set aside the amount at compound interest over the period of years would have exceeded the amount alleged to be necessary to amortize the road; and that virtually the same result had been accomplished by the large dividends paid. The Brimstone's capital stock was of a par value of $200,000 and it paid dividends thereon of 100 per cent in 1914, 60 per cent in 1917, and 40 per cent in 1918. Coupled therewith it must not be forgotten that its notes, issued for the construction of the road and a canal, later abandoned, had been paid off and that at the beginning of the proceeding it had again accumulated a surplus, represented by a credit balance in profit and loss of $165,378.82, or over three-fourths of its capitalization. Except for new property paid for out of earnings, it does not appear that there was ever invested in the company money or assets other than that represented by the paid-off notes and the capital stock. R. 49, 167.)

The Commission's order does not affect surplus or earnings prior to the commencement of the proceeding. It operates only to reduce excessive revenues which continued under the then divisions after the proceeding commenced. Moreover, the divisions prescribed and the adjustments ordered permit of a return of 5¾ per cent to the owners, although it would seem that their original investment had already been repaid.

The Commission's action redresses two wrongs. Because of the close affiliation of the Brimstone and the Sulphur Company the excessive divisions constituted rebates to the proprietary company. *O'Keefe* v. *United States*, 240 U. S. 292, 302; *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, 445. The departures from the published rates thereby effected is checked by the Commission's order and the further result is to properly distribute between the carriers the revenues received for the carriage of the traffic. In accomplishing the latter, the Commission is not acting as a court, effecting restitution to the stockholders of the other carriers. Its action is purely regulatory and is designed to enforce a division of revenues commensurate with the service rendered by, and the needs of, the participating carriers, to the end that the particular services herein involved may furnish their fair shares of the revenues required by each carrier to maintain an efficient transportation service for the public. The *New England Divisions* decision, supra, referring to the

intended working of the divisions paragraph of the Act, reads, p. 191:

> This, it was hoped, would enable the whole transportation system to be maintained without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

CONCLUSION

The Commission may, when the need for its action is limited to the proper adjusting of a tap-lines division, fix separately that division while regarding the remainder of the joint rates as a joint division or proportion going to the other participating carriers. It follows that in such case the Commission, in giving the due consideration required by the divisions paragraph to the needs, public importance, etc., of the respective parties to the joint rates, should balance those factors with relation to the tap line, on the one hand, and with relation to the other carriers, jointly and not separately considered, on the other hand; and where the result of the Commission's action is to decrease the division of the tap-line and to correspondingly increase the joint proportion of the remaining carriers its primary obligation is to safeguard the public interest in, and fair return of, the industrial carrier through careful consideration given to detailed evidence, while, in so far as the other car-

riers are concerned, the "due" consideration required by the Act in this particular may be complied with by consideration given to less detailed evidence, for their interests and that of the public in their efficient operation has been promoted rather than endangered by the action taken.

These requirements, having been fully met in the instant case, the Brimstone can not urge, either on its own or the public's behalf, that more detailed consideration should have been given to the needs and public importance of the remaining carriers. Its maximum right is its fair return. The public interest in its efficient operation was safeguarded by detailed evidence in respect of its operations. The public interest in the efficient operation of the remaining carriers was promoted by an increased joint proportion. The public's only other interest would be that of lower rates, if upon closer analysis that increased proportion had proved to be more than adequate for the service rendered by those remaining carriers, thereby indicating that the whole given sum presented for division amounted in fact to more than a reasonable rate. But the reasonableness of the joint rate itself is not in issue in a supplemental divisions proceeding and the duty imposed upon the Commission does not extend beyond the need for its action.

As a condition precedent to the adjustment of divisions back to the commencement of a proceed-

ing, the Act requires that the joint rates must have been "established pursuant to a finding or order of the Commission." The joint rates here involved were admittedly established by the carriers pursuant to authority or permission contained in findings of the Commission rendered in *Ex Parte 74* and *Reduced Rates, 1922*, thereby strictly conforming to the letter of the Act. The Act did not require that they be established in the sense of ordered. It significantly permitted that they be established pursuant to finding as well as order of the Commission. Furthermore, the divisions paragraph must be read with particular reference to that other paragraph added by the Transportation Act, 1920, namely, paragraph (2) of section 15a. That paragraph provides for the adjustment of rates based upon the aggregate needs of the carriers as a whole or as a whole in rate groups. Such uniform adjustment of rates is a practical necessity, but rates so adjusted, while providing for average needs, disregard for the moment the needs of the individual carrier. It is left for those individual needs to be separately cared for, and particularly through the Commission's authority to fix divisions. Theoretically the distribution of revenues as between the carriers so provided for should take place contemporaneously with the effective date of the joint rates, but in practice delay is inevitable except in the smaller proceedings in-

volving specific joint rates. The authority to adjust divisions back to the commencement of a division proceeding is obviously conferred to offset in a measure such delay, and, as said, has especial reference to divisions of such joint rates as have been established in just such general rate-group proceedings as *Ex Parte 74*, particularly since it must have been foreseen that the innumerable divisions involved in general rate proceedings could not as a practical matter be fixed in the one proceeding.

The payments of excess income made by appellants under the recapture clause were based on its own unadjusted operating figures and estimate of property value, and not, as required by the Act, upon value determined by the Commission. They are therefore tentative payments subject to readjustment in accordance with findings of the Commission after recapture proceedings have been held. Since they are in no sense final and since recapture only operates against excess income actually earned by the carrier, no grounds exist for the assumption that those tentative payments will not be returned or readjusted in accordance with the amount of excess income, if any, which may be found to have been earned under the divisions as now adjusted by the Commission.

Appellant's claim that the divisions allowed deny it a fair return is discredited by the large amount of evidence in the record bearing upon this issue

and the painstaking consideration which the Commission's reports show was given thereto. Where, as in this case, a confusing of carrier and plant service obtains the determination of what is or what is not a fair return is not susceptible to the exact mathematical proof attempted by appellant. The chief difficulty confronting the Commission was that in respect of properly apportioning costs as between carrier and plant service. The report shows that appellant was liberally treated in the adjustments so necessitated.

The right to amortize investment in a public utility does not exist where, as in this case, through excessive compensation exacted for service rendered, the owners have already received back their investment, as evidenced by the discharge of all debt contracted in construction, the declaration within the course of a few years of dividends amounting to 200 per cent upon a capitalization that represented the only paid-in investment and a surplus within two years thereafter accumulated equaling more than three-fourths of that investment.

The Commission's action accomplishes two results, in that it not only makes proper distribution of revenues from joint rates in the interest of efficient transportation at reasonable charge by all participating carriers but it also prevents the departures from published rates now being effected through the device of excessive divisions allowed to a shipper-owned carrier.

We respectfully submit that the decree of the District Court should be affirmed.

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Cord.